(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the due process clauses of the 5th and 14th Amendments to the United States Constitution require the states to permit an untimely appeal from the denial of state post-conviction relief where that appeal is untimely solely through an error of counsel and in disregard of specific instructions from a capital defendant.

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OPINIONS BELOW

The *per curiam* opinion of the Supreme Court of Alabama is unreported and is reproduced at Appendix A. The opinion of the Alabama Court of Criminal Appeals is reported at No. CR-03-0021, 2004 WL 102861 (Ala. Crim. App. Jan. 23, 2004) and is reproduced at Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. The opinion below was entered on September 3, 2004. This timely petition for a writ of certiorari follows.

CONSTITUTIONAL PROVISIONS INVOKED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Alabama seeks to execute a capital defendant and at the same time deny that defendant access to its courts solely because of a fundamental error of counsel. The Supreme Court of Florida has held that such a rule violates federal due process. The Supreme Court of Alabama has held that it does not.

This Court should now grant certiorari to resolve a settled conflict between state courts of last resort over the meaning of an important federal constitutional right – the bedrock right of due process. The fact that this case involves a death sentence only adds to the importance of granting certiorari.

FACTS AND PROCEEDINGS BELOW

Petitioner Cory Maples was convicted of a double murder and – based on the 10-2 recommendation of an Alabama jury – sentenced to death.[1] The Alabama courts affirmed Mr. Maples's conviction and sentence on direct appeal.[2]

On August 1, 2001, Mr. Maples sought state collateral review of his conviction and sentence by filing a Petition for

1. On October 30, 1997, Cory Maples was convicted of two counts of capital murder in Morgan County, Alabama and sentenced to death. *See Maples v. State*, 758 So. 2d 1, 14 (Ala. Crim. App. 1999).

2. On March 26, 1999, the Alabama Court of Criminal Appeals affirmed Mr. Maples's conviction and sentence. *See Maples v. State*, 758 So. 2d 1, 14 (Ala. Crim. App. 1999). On December 10, 1999, the Alabama Supreme Court affirmed that decision. *See Ex parte Maples*, 758 So. 2d 81, 85 (Ala. 1999).

Relief from Judgment pursuant to Ala. R. Crim. P. 32.1(f).[3] At the time, Mr. Maples was represented by attorneys from Sullivan & Cromwell of New York, New York and by John G. Butler of Huntsville, Alabama. The Sullivan & Cromwell attorneys represented Mr. Maples *pro bono publico*, and Mr. Butler appeared only to move for the *pro hac vice* admission of the two New York lawyers handling the matter.[4]

The Alabama trial court allowed Mr. Maples's petition for post-conviction relief to sit unresolved for almost two years. The court refused to schedule the requested evidentiary hearing and did not rule on the merits.[5]

During the interim, Mr. Maples periodically met with his lawyers. During those sessions, Mr. Maples specifically instructed his counsel to appeal any denial of his pending petition and counsel specifically assured Mr. Maples that they would do so. *See* Appendix C.

On May 22, 2003, the Alabama court summarily denied Mr. Maples's Rule 32 Petition. The Court's order was mailed to counsel of record.[6] In the almost two years between the filing of Mr. Maples's Petition and its denial, the two Sullivan

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3. Among other things, Mr. Maples's Rule 32 Petition raised Sixth Amendment claims of ineffective assistance of counsel at trial and sentencing.

4. Sullivan & Cromwell associates Clara Ingen-Housz and Jaasi Munaanka were counsel of record in the matter along with Mr. Butler.

5. Mr. Maples requested a full evidentiary hearing at the time he filed his Rule 32 Petition.

6. The court did not send Mr. Maples a copy of the Order.

& Cromwell lawyers who were counsel of record had left the firm. The envelopes containing their copies of the May 23, 2003 Order were returned to the Alabama court unopened, with a prominent handwritten notation on one of the envelopes: "Return to Sender – Left Firm."

Although Mr. Butler's firm received and opened his copy of the Order, Mr. Butler did nothing – assuming that his role in the case was limited to moving for the admission of the Sullivan & Cromwell attorneys and further assuming that they would handle any contemplated appeal.[7] The Court also did nothing. It did not attempt to forward the returned envelopes. It did not attempt to contact local counsel or to schedule a status conference to clear up any ambiguity concerning Mr. Maples's representation.

The State, however, was not idle. Despite knowing that Mr. Maples was represented by counsel throughout this period, the Alabama Attorney General's office waited until after the time for Mr. Maples to appeal had expired, and then contacted Mr. Maples directly and *ex parte* to inform him of that fact. The State's *ex parte* contact was the first time that Mr. Maples learned that his Rule 32 Petition had been denied and that his time to appeal had expired.

On October 8, 2003, Mr. Maples petitioned the Alabama Court of Criminal Appeals for a writ of mandamus allowing him to take an untimely appeal on the merits.[8] In support,

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7. Mr. Butler was unaware that the two attorneys at Sullivan & Cromwell had left the firm.

8. The Alabama Supreme Court has held that a writ of mandamus is the only procedure by which a criminal defendant may seek an untimely appeal from the denial of post-conviction collateral relief under Rule 32. *See Marshall v. State*, No. 1012217, 2003 WL 22221211, at * 4-5 (Ala. Sept. 26, 2003).

Mr. Maples relied heavily on federal due process grounds – citing a prior decision of the Alabama Court of Criminal Appeals, *Marshall v. State*, holding on remarkably similar facts that federal due process requires the states to allow an untimely appeal from the denial of a Rule 32 Petition. *Marshall v. State*, No. CR-01-0204, 2002 WL 1141511, at *2 (Ala. Crim. App. May 31, 2002)[9] ("Accordingly, on the authority of *Fountain* and *Brooks* we find that regarding his out-of-time-appeal claim, Marshall is entitled to the relief requested . . ."). [10] Counsel of record submitted affidavits in support of the relief sought – affidavits establishing that Mr. Maples's appeal was untimely solely through an error of counsel and through no fault of his own.

That Mr. Maples based his mandamus petition on federal due process grounds is not seriously in dispute. As the Alabama Attorney General noted in his brief before the Court of Criminal Appeals:

> Maples' entire procedural due process argument is crafted from this Court's inapplicable holding

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9. Reversed on other grounds by *Marshall v. State*, No. 1012217, 2003 WL 22221211 (Ala. Sept. 26, 2003).

10. *Fountain* and *Brooks* in turn rested on principles of federal due process. *See Ex parte Fountain*, 842 So. 2d 726, 730 (Ala. 2001) ("For this denial of appellate due process, that aspect of the judgment of the Court of Criminal Appeals affirming the denial of Fountain's Rule 32 petition must be reversed, although we affirm that aspect of the judgment of the Court of Criminal Appeals affirming the grant of the out-of-time appeal."); *Brooks v. State*, No. CR-00-1134, 2002 Ala. Crim. App. LEXIS 107, at *13-14 (Apr. 26, 2002) ("An inmate's lack of notice as to when the 42-day appeal period commences, we think, is tantamount to an inmate's receiving no notice of a ruling at all, at least for purposes of satisfying the requirements of procedural due process.").

> in *Marshall* . . . Procedural due process, however, is applicable only where a party is denied his day in court because the court, acting through its clerk, assumed the duty of notifying the party of his scheduled trial date and then negligently failed to do so.

State's Brief at 7.

The Court of Criminal Appeals explicitly acknowledged the due process implications of this argument:

> Maples argues that the Supreme Court's holding in *Marshall* is applicable to this case and that he is entitled to an out-of-time appeal because the time for filing an appeal expired through no fault of his own without an appeal being filed. The State argues that the holding in *Marshall* does not apply to this case because "Procedural due process . . . is applicable only where a party is denied his day in court because the court, acting through its clerk, assumed the duty of notifying the party of his scheduled trial date and then negligently failed to do so."

Ex parte Maples, No. CR-03-0021, 2004 WL 102861, at 1 (Ala. Crim. App. Jan. 23, 2004).

In response, the Alabama Attorney General argued that *Marshall* is distinguishable because the defendant in that case was not represented by counsel. According to the Attorney General, *Marshall* is unlike this case because *Marshall* did not involve an error of counsel. The Alabama Court of Criminal Appeals agreed, distinguished *Marshall* on that

basis, and held that an error of counsel even in these circumstances is insufficient to allow an untimely appeal on due process grounds *See id.* at *5 ("Maples has failed to show that his right to procedural due process was violated.").

Marshall itself, however, does not make clear whether the defendant in that case was represented by counsel or not (and therefore whether – as here – the appeal was untimely due to an error of counsel). Accordingly, counsel in this case sent a team to Alabama to pull the court records and determine whether the Alabama Attorney General (n.b., a party in *Marshall* both to the original Rule 32 proceeding and to the relevant appeals) had distinguished the case appropriately.

On February 6, 2004, Mr. Maples sought a writ of certiorari from the Alabama Supreme Court.[11] During the course of those proceedings, counsel for Mr. Maples discovered that: (1) the defendant in *Marshall* had in fact been represented by counsel (both at the time his original Rule 32 Petition was denied and when his time to appeal expired); (2) Marshall's counsel had been mailed a copy of the relevant order; and (3) Marshall's counsel – as here – had failed to appeal.[12] These new facts, rendering *Marshall* indistinguishable from the present case, were brought before the Alabama Supreme Court by letter brief on June 28, 2004. *See* Appendix C.

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11. Mr. Maples's mandamus petition before the Alabama Supreme Court similarly preserved his due process challenge – explicitly referring to the due process clause of the 14th Amendment and arguing that due process requires the states to allow an untimely appeal in these circumstances.

12. White & Case personnel Cecilia M. Bidwell and Robert M. Fojo discovered these facts on June 21, 2004 — after the parties had submitted their briefs to the Alabama Supreme Court.

On September 4, 2004, the Alabama Supreme Court issued a *per curiam* summary decision with one dissent denying Mr. Maples an out-of-time appeal. *See* Appendix A. This Petition follows.

REASONS FOR GRANTING THE PETITION

I. In Direct Conflict With the Opinion Below, the Supreme Court of Florida Has Held That Federal Due Process Requires the States to Allow an Untimely Appeal from the Denial of State Post-Conviction Relief Where That Appeal is Untimely Solely Through an Error of Counsel and in Disregard of Specific Instructions from a Capital Defendant.

According to the Supreme Court of Florida, federal due process requires the states to allow an untimely appeal from the denial of state post-conviction relief where (as here) the appeal was untimely solely through an error of counsel and in disregard of specific instructions from a capital defendant. *See Williams v. State*, 777 So. 2d 947 (Fla. 2001).[13] In *Williams*, a defendant sought an untimely appeal from the denial of his collateral motion for post-conviction relief. In support, the defendant noted that counsel had ignored his specific instructions to appeal should the petition be denied.

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13. Further establishing the settled nature of the conflict supporting certiorari in this case, the Supreme Court of Tennessee in *Stokes v. State*, 146 S.W.3d 56 (Tenn. 2004), has held that a defendant "is not denied due process by his post-conviction counsel's failure to either withdraw as counsel or file [a timely] application for permission to appeal . . ." *Stokes*, 146 S.W.3d at 62. Although *Stokes* did not involve an untimely appeal in the face of a capital defendant's specific instructions and assurances to the contrary (as here), *Stokes* nonetheless applies a more narrow view of due process than *Williams*.

Id. at 949. The Florida Supreme Court held that federal due process requires the states to allow an untimely appeal in such circumstances. *See id.* at 950. As the court held:

> [D]efendant can file a belated appeal of the trial court's denial of a rule 3.850 or rule 3.800 motion due to counsel's neglect.

Id. (internal quotations omitted).[14]

The Florida Supreme Court based its *Williams* holding on its prior decision in *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999). *See id.* at 950-51. In *Steele*, the court held that federal due process requires the states to allow a defendant to file an untimely petition for post-conviction relief where counsel negligently fails to file the petition within the applicable statute of limitations despite an oral promise to do so. *Steele*, 747 So. 2d at 934. Although *Steele* involved an untimely petition for post-conviction relief, rather than a belated appeal from the denial of such relief, the Supreme Court of Florida found the same federal due process rights to be implicated:

> We find the state's attempt to distinguish *Steele* unavailing: If a defendant potentially can file a belated [motion for post-conviction relief] due to counsel's neglect, it should follow that the defendant can file a belated appeal of the trial court's denial of a [motion for post-conviction relief] due to counsel's neglect.

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14. Florida Rules of Criminal Procedure 3.800 and 3.850 are grounds for state collateral review – analogous to Alabama Rule of Criminal Procedure 32 at issue in this case.

Williams, 777 So. 2d at 950 (internal quotations and citations omitted).

II. In Conflict with the Opinion Below, the Supreme Courts of Arkansas, Florida and Mississippi Have Held That Federal Due Process Requires the States to Allow an Untimely Petition for State Post-Conviction Relief Where The Petition Is Untimely Solely Through an Error of Counsel.

In *Porter v. State*, the Arkansas Supreme Court held that due process can require the states to allow an untimely petition for collateral post-conviction relief:

> [W]hile there is no constitutional right to a post-conviction proceeding, when a State undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair. Here, the question becomes whether it is fundamentally fair to require an inmate on death row to abide by stringent filing deadlines when he was under the impression he was represented by counsel and that counsel was timely filing the proper pleadings.

Porter v. State, 2 S.W.3d 73, 75 (Ark. 1999) (internal quotations and citations omitted). In *Porter*, the defendant had been represented by counsel at the time his petition was denied and when his time to appeal expired. *Id.* at 75-76. Based on those facts, the court concluded:

> In light of the fact that this is a case involving the death penalty and the fact that Rule 37.5 has in effect cured the instant situation from recurring, coupled with the ambiguous circumstances

> surrounding appellant's legal representation, and the requirements of due process, we hereby hold that fundamental fairness, *in this narrowest of instances where the death penalty is involved*, dictates an exception in the present matter to allow appellant to proceed with his [untimely] Rule 37 petition.

Id. at 76 (emphasis in original).

As noted above, in *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999), the Florida Supreme Court held that due process entitles a defendant to file an untimely petition for collateral review if the defendant missed the deadline "because his or her attorney had agreed to file the motion but failed to do so in a timely manner" *Id.* at 934. As the court noted, post-conviction remedies "are subject to the more flexible standards of due process announced in the Fifth Amendment [to the] Constitution of the United States." *Id.*

In *Puckett v. State*, 834 So. 2d 676 (Miss. 2002), the Supreme Court of Mississippi considered whether to allow an untimely petition for collateral post-conviction relief. The court held that due process requires the states to allow an untimely petition "when a party is prohibited from exercising his right to proceed by circumstances which are clearly beyond his control and rise to such a dimension as to implicate due process and fundamental fairness." *Id.* at 678.[15]

---

15. The court in *Puckett* based its holding on principles of due process rather than a right to effective assistance of counsel. *Puckett*, 834 So. 2d at 678. Although Mississippi affords capital defendants a right to counsel in collateral proceedings, it also imposes a statutory deadline on the filing of petitions for post-conviction relief. *See id.* at 677.

III. This Court Should Grant Certiorari Because the Opinion Below Implicates Important Constitutional Rights – the Right to Due Process and the Right of Access to the Courts.

This Court previously has held that the United States Constitution does not guarantee a right to effective assistance of counsel in state collateral proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752-57 (1991); *Murray v. Giarratano*, 492 U.S. 1, 8-10 (1989). An error of counsel, however, can be so fundamental as to deny a capital defendant fair access to the courts. As the Second Circuit has noted, a party without a Sixth Amendment right to counsel may nonetheless be denied due process by counsel's failure to seek collateral relief when instructed to do so. *See Rabiu v. INS*, 41 F.3d 879, 882-84 (2d Cir. 1994).

Here, counsel not only failed to file a timely appeal, but did so in direct violation of specific instructions from the defendant to appeal and specific assurances from counsel that an appeal would be taken. In such circumstances, federal due process requires the states to allow an untimely appeal and thereby provide fundamental fairness to those who seek access to the judicial process.

CONCLUSION

For the reasons set forth above, Petitioner Cory R. Maples respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF ALABAMA DENYING PETITION FOR WRIT OF MANDAMUS DATED SEPTEMBER 3, 2004

IN THE SUPREME COURT OF ALABAMA

September 3, 2004

1030701

Ex parte Cory R. Maples. PETITION FOR WRIT OF MANDAMUS: CRIMINAL (In re: State of Alabama v. Corey Maples) (Morgan Circuit Court: CC-95-842.60; Criminal Appeals: CR-03-0021).

ORDER

IT IS ORDERED that the petition for writ of mandamus in this cause is denied.

Petition Denied.

LYONS, J., - Nabers, C.J., and Houston, Brown, Harwood, Woodall, and Stuart, JJ., concur. Johnstone, J., dissents.

s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX B — OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA DATED JANUARY 23, 2004

Court of Criminal Appeals of Alabama.

CR-03-0021.

Ex parte Cory R. MAPLES.
(In re State of Alabama

v.

Corey Maples[1]).

Jan. 23, 2004.

PER CURIAM.

The petitioner, Cory R. Maples, filed this petition for a writ of mandamus requesting an out-of-time appeal from the denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P. In 1997, Maples was convicted of capital murder for the murder of Stacy Alan Terry and Barry Dewayne Robinson II pursuant to one course of conduct and for the murder of Stacy Alan Terry during the course of a robbery. The jury, by a vote of 10 to 2, recommended that Maples be sentenced to death. Maples's convictions and sentence of death were affirmed on direct appeal. See *Maples v. State*, 758 So. 2d 1 (Ala. Crim. App.), *aff'd*, 758 So. 2d 81 (Ala. 1999).[2]

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1. The petition filed in this Court was styled "Cory" Maples; however, the petitioner's name on the circuit court's records is spelled "*Corey*" Maples.

2. This Court, in an 80-page opinion, addressed 33 issues on Maples's direct appeal.

Appendix B

In August 2001, Maples filed a Rule 32, Ala. R. Crim. P., petition attacking his conviction and death sentence. On May 22, 2003, Judge Glenn Thompson denied that petition. On May 23, 2003, the circuit clerk mailed copies of the order denying the petition to the Alabama attorney general's office and to Maples's attorneys—Alabama attorney John G. Butler and New York attorneys Clara Ingen-Housz and Jaasi Munanka. The notices sent to the New York attorneys were returned to the circuit clerk's office. On the outside of one of the envelopes were handwritten the words "Left Firm." It is undisputed that Maples's Alabama attorney received the timely notice that the Rule 32 petition had been denied.

In August 2003, Maples's mother contacted the New York law firm of Sullivan & Cromwell, the firm at which his New York attorneys were associates, and informed them that the Alabama attorney general's office had notified her son that his Rule 32 petition had been denied and that the time for filing an appeal had expired. Felice Duffy, an associate with Sullivan & Cromwell, investigated and discovered that Maples's petition had been dismissed in May 2003. Duffy and two other associates with Sullivan & Cromwell filed a motion in the circuit court seeking to have Judge Thompson reissue his May 22, 2003, order denying the Rule 32 petition so that they could file a timely notice of appeal. Judge Thompson denied that motion.

Twenty-three days after Judge Thompson denied the motion to reissue the order denying the petition, the Alabama Supreme Court released *Marshall v. State*, [Ms. 1012217, September 26, 2003] __ So. 2d __ (Ala. 2003). Based on the Supreme Court's holding in *Marshall*—that a writ of mandamus

Appendix B

Supreme Court's holding in *Marshall*—that a writ of mandamus is the only method by which to obtain an out-of-time appeal from the denial of a Rule 32 petition—Maples filed this petition for a writ of mandamus requesting that we grant him an out-of-time appeal.

Maples argues that the Supreme Court's holding in *Marshall* is applicable to this case and that he is entitled to an out-of-time appeal because the time for filing an appeal expired through no fault of his own without an appeal being filed. The State argues that the holding in *Marshall* does not apply to this case because "Procedural due process . . . is applicable only where a party 'is denied his day in court because the court, acting through its clerk, assumed the duty of notifying the party of his scheduled trial date and then negligently failed to do so.' " (State's brief at p. 7, quoting *Ex parte Weeks*, 611 So. 2d 259, 262 (Ala. 1992)). The State further argues that Maples's attorneys had a duty to monitor the status of his Rule 32 petition and that they failed to do so.

Judge Thompson's order denying the motion to reissue the order denying the petition stated:

> "The petitioner, Corey R. Maples, has filed a Motion to Reissue the Court's May 22, 2003, Order denying the Petitioner's Rule 32 petition. On August 1, 2001, the petitioner, through his counsel Clara Ingen-Housz and Jaasi Munanka, together with local counsel, John G. Butler, Jr., filed a Rule 32 petition with the Circuit Court requesting post-conviction relief for the petitioner,

Appendix B

Corey R. Maples. On May 22, 2003, the Circuit Court of Morgan County entered an order denying the petitioner's Rule 32 relief. On May 23, 2003, the Clerk of the Circuit Court, John Pat Orr, mailed copies to all of the attorneys of record at the addresses provided by each attorney. Included on that list were attorneys Clara Ingen-Housz and Jaasi Munanka at 125 Broadway Street, New York, New York 10004-2498, as well as local counsel John G. Butler. The Court received the copy sent to Jaasi Munanka as 'Return to Sender—Attempted Unknown' and the copy sent to Clara Ingen-Housz marked 'Return to Sender—Attempted Not Known' and written in longhand is 'Return to Sender—Left Firm.'

"Counsel Munanka and Ingen-Housz were both admitted pro hac vice on November 5, 2001, and entered appearances of record for the petitioner. John G. Butler is licensed to practice in the State of Alabama. The petitioner's new counsel with the same firm, Sullivan and Cromwell, L.L.P., are asking this Court to vacate its May 22, 2003, order and enter a new order denying the petitioner's Rule 32 petition. To do so would perpetrate subterfuge on the appellate court.

"A review of the file shows John G. Butler, Jr., did in fact get served. Jaasi Munanka and Clara Inga-Housz apparently have left the firm of Sullivan and Cromwell, although they have not withdrawn from the Corey Maples' case and now

lawyers Marc De Leeuw, Felice Duffy, and Cathy Brewer are of counsel for the petitioner, Corey Maples. De Leeuw, Duffy, and Brewer apparently work at the same law firm of Sullivan and Cromwell in New York, New York, and have not yet been admitted to practice in Alabama, [and,] therefore, have not entered appearances as attorneys of record to the Clerk of this Court because they have not yet been admitted. Other than the fact that the most recent mailings to attorneys Ingen-Housz and Munanka have been returned by the post office as 'Attempted—Unknown' they are still attorneys of record for the petitioner. How can a Circuit Clerk in Decatur, Alabama, know what is going on in a law firm in New York, New York? The Clerk mailed copies to the attorneys of record—who remain attorneys of record, and mailed copies to the local lawyer. What counsel for the petitioner is in effect doing is allowing this Court to permit an out-of-time appeal. This Court is unwilling to enter into subterfuge in order to gloss over mistakes made by counsel for the petitioner. If the petitioner is entitled to an out-of-time appeal, let the Court of Appeals so rule.

"Counsel for the petitioner have cited several cases in defense of their position. Most notable are *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001), *Ex parte Miles*, 841 So. 2d 242 (Ala. 2002), and *[Ex parte] Robinson*, 865 So. 2d 1250 (Ala. Crim. App. 2003). These cases can be

> distinguished from the case at hand because they involved pro se defendants who never received notice of the outcome of their Rule 32 petitions because the Court failed to take the necessary action to notify the defendant. The petitioner in this instance is represented by several lawyers. The Circuit Clerk mailed notices to these lawyers at their listed addresses. Despite the fact that two of the packets were returned, the petitioner's local counsel did in fact receive notice. As a result, there is no evidence that the Court committed error or neglect in handling this matter."

Maples relies on *Marshall* in support of the issuance of the writ of mandamus. The Alabama Supreme Court in *Marshall*, clarified that a writ of mandamus is the only means by which to secure an out-of-time appeal from the denial or dismissal of a Rule 32 petition. The *Marshall* Court, finding that the circuit clerk had failed to provide Marshall, who was proceeding pro se, notification of the denial of his Rule 32 petition, stated:

> "In *Ex parte Johnson*, [806 So. 2d 1195 (Ala. 2001),] this Court found that Bonnide Johnson 'was not notified that his Rule 32 petition was denied'— even though he 'asked, through the office of the circuit clerk, that he be notified of material developments in his case'—'and the 42-day period during which he could have appealed that denial has expired.' 806 So. 2d at 1197. This Court relied upon and quoted *Ex parte Weeks*, [611 So. 2d 259 (Ala. 1992),] in which this Court stated:

> " ' "Although it is generally held in Alabama that a party is under a duty to follow the status of his case, whether he is represented by counsel or acting pro se, and that, as a general rule, no duty rests upon either the court or the opposing party to advise that party of his scheduled trial date, see the cases collected at 18A Ala. Digest *Trial* § 9(1)(1956), a party's right to procedural due process is nonetheless violated if he is denied his day in court *because the court, acting through its clerk, assumed the duty of notifying that party of his scheduled trial date and then negligently failed to do so.*' "
>
> "806 So. 2d at 1197 (quoting *Ex parte Weeks*, 611 So. 2d at 262) (emphasis added). This Court in *Ex parte Weeks* made it clear that procedural-due-process concerns arose when the court assumed a duty of notification it did not otherwise owe the petitioner and then failed to perform that duty."

__ So. 2d at __. The holding in *Weeks* has been narrowly applied. A writ of mandamus has issued only in similar fact situations when there was evidence indicating that the circuit clerk failed to mail notification that the Rule 32 petition had been denied. See *Marshall*, supra; *Ex parte Miles*, 841 So. 2d 242, 244 (Ala. 2002) (inmate did not receive notice of denial of petition and "to not allow Miles an opportunity to file a notice of appeal under these circumstances would violate his clear legal right to procedural due process"); *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001) (inmate did not receive notification of denial of Rule 32 petition so writ of mandamus issued).

Appendix B

In *Ex parte Swoope*, 724 So. 2d 92, 95-96 (Ala. Crim. App. 1998), we recognized the long-standing Alabama rule that a party has a duty to monitor the status of his or her case. We stated:

> "It is the policy of the judicial system of this state that an accused has a duty to monitor the status of his case. *Ex parte Weeks*, 611 So. 2d 259 (Ala. 1992). This policy was discussed in *Hart v. City of Priceville*, 631 So. 2d 301 (Ala. Cr. App. 1993):
>
> > " ' "[I]t is generally held in Alabama that a party is under a duty to follow the status of his case, whether he is represented by counsel or acting pro se, and that, as a general rule, no duty rests upon either the court or the opposing party to advise that party of his scheduled trial date, see the cases collected at 18A, Ala. Digest *Trial* § 9(1) (1956)." *Ex parte Weeks*, 611 So. 2d 259, 262 (Ala. 1992). "Generally, a party, whether represented by counsel or acting pro se, has a duty to keep abreast of the status of his case, and no duty rests on the court or opposing parties to advise him of the trial date." *Bowman v. Slade*, 501 So. 2d 1236 (Ala. Civ. App. 1987).' "

See also *Johns v. A.T. Stephens Enters., Inc.*, 815 So. 2d 511, 515 (Ala. 2001) (" '[A]ll parties litigant, once in court, either for themselves or through their attorneys[,] must keep track of their case, [and] know [its] status. . . .' "); *Averett*

v. Averett, 255 Ala. 606, 610, 52 So. 2d 371, 375 (1951) (" 'A litigant by his attorney must keep up with the progress of his case in court, and he is not due to have notice, except as prescribed by law.' "); *Faust v. Faust*, 251 Ala. 60, 36 So. 2d 229 (1948); *Wetzel v. Birmingham Elec. Co.*, 250 Ala. 267, 268, 33 So. 2d 882, 882 (1948) ("As the aggressive party in the case it was plaintiff's duty to follow his case in all of its steps until finally disposed of and no duty rested upon the court or its officers or the adverse party to advise plaintiff of the setting of the case for trial."); *Thompson v. Odom*, 279 Ala. 211, 184 So. 2d 120 (Ala. 1966); *State v. Woodham*, 276 Ala. 662, 166 So. 2d 391 (1964). Alabama is not alone in recognizing this policy. See *Vilsick v. Fibreboard Corp., et al.*, 861 S.W.2d 659, 664 (Mo. Ct. App. 1993) ("A party has a continuing duty to monitor a case from the filing of the case until final judgment."); *Blichert v. Brososky*, 436 N.E.2d 1165, 1168 (Ind. Ct. App. 1982) ("When an attorney appears in court for a client, it becomes his duty to keep advised of the progress of the case."); *Oklahoma Bar Ass'n v. Braswell*, 663 P.2d 1228 (Okla. 1983) (attorney has duty to monitor status of case). Cf. *Kawazoe v. Davila*, 849 S.W.2d 906 (Tex. App. 1993) (will not impose on layman duty to monitor the status of his case).

The duty to monitor the status of one's case necessarily includes the duty to notify the circuit clerk of any change of address. Here, Maples was represented by three attorneys. Because Maples was represented by attorneys, all correspondence from the circuit clerk was directed to the attorneys. See Rule 34.4, Ala. R. Crim. P. We take judicial notice that every county and circuit has its own method of notifying parties of significant dates in their pending cases.

Appendix B

See *D. & J. Mineral & Mining, Inc. v. Wilson*, 456 So. 2d 1099, 1101 (Ala. Civ. App. 1984) ("This court takes judicial note that the different bars and judicial circuits, even different judges, establish methods and customs of handling court business such as publishing court dockets, granting continuances and giving notice to attorneys."). The circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition. However, the circuit clerk did not act negligently in failing to locate Maples's New York attorneys after their notifications were returned because the two attorneys had left the law firm with which they had been associated and had not provided the circuit clerk with a current address.[3]

Attorneys Clara Ingen-Housz and Jaasi Munanka, both attorneys licensed by the State of New York, applied for and were granted pro hac vice status to represent Maples. Rule VII, Rules Governing Admission to the Alabama State Bar. To be admitted pro hac vice, an out-of-state attorney must associate a local attorney. Here the local attorney was John Butler. Butler stated in his affidavit that is included in the exhibits submitted to this Court that he was given notice of the

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3. We quote with approval the words of the Indiana Court of Appeals:

> "The law imposes a duty upon attorneys to exercise due diligence by regularly checking court records to ascertain the status of pending cases. . . . When an attorney appears in court for a client, it becomes his duty to keep advised of the progress of the case."

Blichert v. Brososky, 436 N.E.2d 1165, 1168 (Ind. Ct. App. 1982).

dismissal of the Rule 32 petition. Rule VII.C., Rules Governing Admission to the Alabama State Bar, provides: "Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause."

The Alabama Supreme Court in *Thomas v. Kellett*, 489 So. 2d 554, 555 (Ala. 1986), held that when one attorney has received notification of a trial date, and cocounsel did not, "the trial court's notification of [one attorney representing a party] and not [the other attorney representing the same party] concerning certain trial matters was sufficient to give notice to both in light of their apparent co-counsel status."

We agree with Judge Thompson that the circuit clerk was not negligent in its duty to notify the parties of the resolution of the Rule 32 petition. Maples has failed to show that his right to procedural due process was violated. In order for a writ of mandamus to issue the petitioner must establish: (1) a clear legal right to the relief sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) no adequate remedy at law; and (4) the properly invoked jurisdiction of the reviewing court. See *State v. Williams*, 679 So. 2d 275 (Ala. Crim. App. 1996). Maples has failed to establish the first of the four prerequisites.[4]

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4. We note that Maples has filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama.

Appendix B

For the foregoing reasons, this petition is due to be, and is hereby, denied.

PETITION DENIED.

McMILLAN, P.J., and COBB, BASCHAB, SHAW, and WISE, JJ., concur.

APPENDIX C — SUPPLEMENTAL LETTER BRIEF TO THE ALABAMA SUPREME COURT DATED JUNE 28, 2004

WHITE & CASE
LIMITED LIABILITY PARTNERSHIP

WACHOVIA FINANCIAL CENTER, SUITE 4900
200 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-2352

TELEPHONE: (1-305) 371-2700
FACSIMILE: (1-305) 358-5744/5766

DIRECT DIAL: (305) 995-5215

June 28, 2004

VIA FEDEX

Hon. Chief Justice
and the Associate Justices of the Alabama Supreme Court
Supreme Court of Alabama
300 Dexter Avenue
Montgomery, AL 36104-3741

Re: *Ex parte Maples*, Case No. 1030701

Your Honors:

This will respond to the June 24, 2004 letter to this Court from Assistant Attorney General James R. Houts.

Appendix C

It is undisputed that the Attorney General's office misled this Court on a key point of substantive law. Although Mr. Houts wrote this Court purportedly to correct that error, he instead used his error as an opportunity for further argument (and, in doing so, to mischaracterize the law further).[1]

In its original brief, the Attorney General's office attempted to distinguish the key decision of *Marshall v. State*, 2002 WL 1141511 (Ala. Crim. App. May 31, 2002). In *Marshall*, the Court of Criminal Appeals allowed a defendant's untimely Rule 32 petition to be heard on the merits (precisely the relief that Mr. Maples seeks here). Mr. Marshall, like Mr. Maples, was unaware of the trial court's denial of his original petition and did not seek timely review of that decision. The Court of Criminal Appeals held that Mr. Marshall's failure to seek timely review was through no fault of his own and therefore was willing to allow review on the merits.

In this case, the Attorney General's office (and the court below) attempted to distinguish *Marshall* on the grounds that Mr. Maples was represented by counsel at the time his Rule 32 petition was denied, that counsel received notice of the Court's action, and, therefore, that counsel's failure to seek timely review should be imputed to Mr. Maples. State's Response Brief at 7 (arguing that "in *Marshall* I the defendant had appeared pro se" and therefore "[t]he fact that Maples's local counsel received the order [ ] completely removes this case from the court's rationale in *Marshall*"); *see also Maples*

1. Mr. Houts only agreed to write to this Court after Mr. Maples's defense team traveled to Alabama and discovered court records establishing the State's error.

v. State, No. CR-03-0021, 2004 WL 102861, at *3, *4 (Ala. Crim. App. Jan. 23, 2004) (noting that "Maples relies on *Marshall* in support of the issuance of a writ of mandamus," that Marshall, unlike Maples, was "proceeding pro se" because "[h]ere, Maples was represented by three attorneys."). The Attorney General's office essentially argued that Mr. Marshall (unlike Mr. Maples) had proceeded pro se and therefore had no counsel whose negligence could be imputed to him. *Id.*

Court records, however, now establish that both the Attorney General's office and the court below were just plain wrong when they distinguished *Marshall* from this case on the grounds that Mr. Maples was represented by counsel, whereas Mr. Marshall was not.[2] ***The simple fact is that Mr. Marshall (like Mr. Maples) was represented by counsel both at the time his Rule 32 petition was denied and at the time his deadline to seek review of that decision expired.***

Both *Marshall* and this case therefore involve an error of counsel. Consistent with this Court's precedent allowing

2. Mr. Houts seeks to obscure this distinction by arguing that Mr. Marshall had some sort of dual pro se/represented status. State's Letter at 1. Yet, this misses the point entirely. When Mr. Marshall's Rule 32 petition was denied and his time to seek review expired, he was either represented by counsel or not.

Mr. Marshall (like Mr. Maples) was in fact represented throughout this period. Accordingly, *Marshall*'s focus on whether the defendant was notified personally is important only if a failure to do so would establish that the untimeliness of the review was — in the words of the rule — "through no fault of his own." Ala. R. Crim. P. 32.1(f).

untimely direct appeals where counsel (rather than a litigant) is responsible for the error, *Marshall* allowed merits review of a Rule 32 proceeding where the defendant failed to seek timely review through no fault of his own. *See, e.g., Wright v. State*, 845 So. 2d 836, 839 (Ala. Crim. App. 2001) (petitioner entitled to an out-of-time appeal if counsel erred by failing to appeal within the prescribed time); *Johnson v. State*, 848 So. 2d 282, 283 (Ala. Crim. App. 2002 (same); *see also Clayton v. State*, 867 So. 2d 1150, 1152 (Ala. Crim. App. 2003) (petitioner entitled to an out-of-time appeal where counsel failed to seek timely review after being instructed to do so); *Seay v. State*, 2003 WL 586713, at *2 (Ala. Crim. App. Feb. 28, 2003) (petitioner entitled to an out-of-time appeal where counsel represented that he would appeal and failed to do so).[3]

Rather than acknowledge the State's error and simply argue that *Marshall* was wrongly decided, Mr. Houts instead seeks to distinguish *Marshall* on other grounds. Yet, the reasoning of the State's original brief itself now establishes that *Marshall* should dispose of this case.

According to the State, *Marshall* based its holding on the fact that "[n]othing in the circuit court's order indicates that the circuit court ever notified Marshall of the dismissal of his first Rule 32 petition." State's Response Brief at 7-8. In the State's own words, therefore, *Marshall* turned on the fact that the trial court never personally notified Marshall — ***a represented***

3. Here, it is undisputed that Mr. Maples specifically requested that his counsel seek review of each adverse decision in the Alabama courts. It is also undisputed that Mr. Maples's counsel (including the undersigned) told Mr. Maples that counsel would in fact seek review of each adverse decision.

defendant — of the dismissal of his Rule 32 petition. *Id.* Absent such personal notice, neither Mr. Marshall nor Mr. Maples should be held liable for his counsel's error.[4]

Respectfully yours,

s/ Kathy E. Brewer
Kathy E. Brewer

KEB:lo

cc: Assistant Attorney General James R. Houts
Hon. Glenn E. Thompson

4. According to Mr. Flouts, *Marshall* somehow instead stands for "the proposition that where a prisoner is represented by an attorney in a collateral proceeding, that attorney's mistakes cannot be attributed to the State." State's Letter at 2. Yet, Marshall stands for just the opposite proposition — where a defendant is represented by counsel, wishes to seek timely review, but fails to do so "through no fault of his own," then the State cannot preclude review on the merits unless it can show that the defendant was personally aware of his right to appeal.